

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

MICKEY C. WEBB,

Plaintiff,

Case No. CV 08-1067-HU

v.

MICHAEL J. ASTRUE, Commissioner
of Social Security,

Defendant.

**FINDINGS AND
RECOMMENDATION**

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HUBEL, Magistrate Judge:

Procedural Background

Plaintiff Mickey C. Webb brought this action for judicial review of the Commissioner's final decision denying him Disability Insurance benefits under Title II of the Social Security Act. On December 1, 2009, I issued Findings and a Recommendation that the Commissioner's decision be affirmed (doc. # 33). Plaintiff objected to the Findings and Recommendation. On March 2, 2010, Judge Mosman adopted my Findings and Recommendation in part, but rejected my recommendation with respect to medical expert testimony (doc. # 42). Judge Mosman remanded that issue to the Commissioner for further proceedings. Id. Plaintiff now seeks attorney's fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 (EAJA).

Discussion

1. "Substantially justified"

Attorney fees are to be awarded to Social Security claimants who win a "sentence four" remand for further administrative proceedings, unless the Commissioner shows that his position with respect to the issue on which the district court based remand was substantially justified. 28 U.S.C. § 2412(d)(1)(A); Corbin v. Apfel, 149 F.3d 1051 (9th Cir. 1998).

To determine whether the government's position was substantially justified for purposes of the EAJA, the court must apply a reasonableness standard. Flores v. Shalala, 49 F.3d 562, 570 (9th Cir. 1995). The standard is met if the government

1 establishes that its position had a "reasonable basis both in law
2 and fact." Kali v. Bowen, 854 F.2d 329, 332 (9th Cir. 1988).

3 The Commissioner argues that his position was substantially
4 justified because I concluded in my Findings and Recommendation
5 that the Commissioner's decision should be affirmed. The
6 Commissioner relies on Pierce v. Underwood, 487 U.S. 552, 565
7 (1988) (position is substantially justified if it is "justified to
8 a degree that could satisfy a reasonable person.") This argument is
9 not persuasive. The fact that one other court agreed or disagreed
10 with the government does not establish whether its position was
11 substantially justified. Pierce, 487 U.S. at 569. Judge Mosman
12 disagreed with my Findings and Recommendation, and wrote separately
13 to explain why. Among other things, Judge Mosman noted that the
14 Court of Appeals had instructed the ALJ to take additional
15 evidence; that the ALJ acknowledged that instruction; that medical
16 testimony would be helpful; and that the ALJ agreed to attempt to
17 find an orthopedist if possible, but then issued his decision
18 without receiving evidence from an orthopedist. Judge Mosman
19 observed, "The decision does not make clear why the ALJ never
20 called a medical expert before reaching a determination regarding
21 Mr. Webb's claim." Opinion and Order filed March 2, 2010 (doc. #
22 42), p. 4. Judge Mosman questioned whether the ALJ had fulfilled
23 his duty to assist plaintiff in developing the record, because his
24 statements on the record about the helpfulness of a medical expert
25 demonstrated a need for additional information. Id.

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1 As Judge Mosman noted in his Opinion and Order, a magistrate
2 judge makes only recommendations to the court; the court is not
3 bound by such recommendations, but retains responsibility for
4 making the final determination. The court is free to accept,
5 reject, or modify any of the magistrate judge's Findings and
6 Recommendations. 28 U.S.C. § 636(b)(1)(C).

7 Judge Mosman's Opinion and Order establishes that the
8 Commissioner's position was not substantially justified.

9 2. Reasonableness of fees requested

10 Plaintiff requests fees in the amount of \$8,504.

11 The court has discretion in determining the reasonableness of
12 a fee award. Rodriguez v. United States, 542 F.3d 704, 709 (9th Cir.
13 2008). Even in the absence of objections by the opposing party, the
14 court has an independent duty to scrutinize a fee request to
15 determine its reasonableness. Gates v. Deukmejian, 987 F.2d 1392,
16 1401 (9th Cir. 1993). According to counsel's declaration, she spent
17 a total of 49.3 hours on the case. EAJA sets a rate ceiling of \$125
18 per hour "unless the court determines that an increase in the cost
19 of living ... justifies a higher fee." 28 U.S.C. § 2412(d)(2)(1).
20 To adjust for the cost of living, this jurisdiction applies the
21 consumer price index for all urban consumers (CPI-U). Jones v.
22 Espy, 10 F.3d 690, 692-93 (9th Cir. 1993) (CPI-U applied for all
23 items, not just legal services).

24 In Harden v. Commissioner, 497 F. Supp.2d 1214, 1215 (D. Or.
25 2007), Judge Mosman has observed that "[t]here is some consensus
26 among the district courts that 20-40 hours is a reasonable amount

1 of time to spend on a Social Security case that does not present
2 particular difficulty." (citing cases). Judge Mosman held that
3 absent unusual circumstances or complexity, "this range provides an
4 accurate framework for measuring whether the amount of time counsel
5 spent is reasonable." Id. at 1216. See also Gill v. Commissioner,
6 CV 07-812-HU (D. Or. December 10, 2008). This case did not present
7 issues that were either unusual or complex. Plaintiff made three
8 arguments (improper credibility findings, rejection of lay witness
9 testimony, and failure to call a medical expert) for reversing the
10 ALJ's decision, all of are typical of Social Security cases. I find
11 nothing in this case that justifies a total number of hours greater
12 than the high end of the range identified by Judge Mosman and other
13 courts. I conclude that 40 hours is reasonable.

14 EAJA sets a ceiling of \$125 per hour "unless the court
15 determines that an increase in the cost of living ... justifies a
16 higher fee." 28 U.S.C. § 2412(d)(2)(A). To adjust for the cost of
17 living, this jurisdiction applies the consumer price index for all
18 urban consumers (CPI-U). Jones v. Espy, 10 F.3d 690, 692-93 (9th
19 Cir. 1993).

20 The CPI-U for July 2010 (the most recent month for which
21 information is available) is 218.011 (table available at
22 <http://www.bls.gov/cpi/cpid1007.pdf>). The adjusted hourly rate is
23 therefore \$175.10. See Ramon-Sepulveda v. INS, 863 F.2d 1458, 1463
24 n. 4 (9th Cir. 1988) (adjusted rate = EAJA ceiling of \$125 per hour
25 multiplied by the CPI-U for the current month (218.011), divided by
26 the CPI-U for the month Congress adopted the current EAJA ceiling,
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1 March 1996 (155.7). Forty hours multiplied by \$175.10 produces a
2 total fee of \$7,004.

3 3. Costs

4 Plaintiff seeks to recover the filing fee (\$350) and costs and
5 reimbursement for copying and postage (\$21.60). A prevailing party
6 entitled to fees and expenses under the EAJA can recover costs and
7 litigation expenses under two distinct EAJA provisions. The statute
8 provides that "a court shall award to a prevailing party other than
9 the United States fees and other litigation expenses, in addition
10 to any costs awarded pursuant to subsection (a)(1), incurred by
11 that party in any civil action..." 28 U.S.C. § 2412(d)(1)(A). This
12 means that the prevailing party is entitled to both "costs"
13 pursuant to subsection (a)(1) and "litigation expenses" pursuant to
14 subsection (d)(1)(A).

15 Recoverable costs under EAJA subsection (a)(1) are governed by
16 28 U.S.C. § 1920, which compensates parties for fees of the clerk
17 and marshal, fees of the court reporter, fees and disbursements for
18 printing and witnesses, fees for exemplification and copies of
19 papers, docket fees, and compensation of court appointed personnel.
20 But the EAJA also awards "fees and other expenses" incurred in the
21 litigation, under subsection (d)(1)(A). The EAJA defines other
22 expenses as "the reasonable expenses of expert witnesses, the
23 reasonable cost of any study, analysis, engineering report, test,
24 or project which is found by the court to be necessary for the
25 preparation of the party's case...." 28 U.S.C. § 2412(d)(2)(A).
26 This provision has been interpreted as expanding rather than
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1 contracting the expenses that are compensable under the statute.
2 See Int'l Woodworkers of America v. Donovan, 792 F.2d 762, 767 (9th
3 Cir. 1985) (holding that expenses enumerated under 28 U.S.C. §
4 2412(d)(2)(A) are examples, not an exclusive list). The court in
5 Int'l Woodworkers upheld EAJA awards that included compensation for
6 telephone calls, postage, and air courier expenses. 769 F.2d at
7 767. Thus plaintiff should be awarded in costs in the amount of
8 \$371.60.

9 **Conclusion**

10 I recommend that plaintiff be awarded fees and costs under
11 EAJA in the amount of \$7,004 as fees and \$371.60 for costs.

12 **Scheduling Order**

13 These Findings and Recommendation will be referred to a
14 district judge. Objections, if any, are due December 13, 2010. If
15 no objections are filed, then the Findings and Recommendation will
16 go under advisement on that date. If objections are filed, then a
17 response is due December 30, 2010. When the response is due or
18 filed, whichever date is earlier, the Findings and Recommendation
19 will go under advisement.

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21 Dated this 23rd day of November, 2010.

22 /s/ Dennis J. Hubel

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24 Dennis James Hubel
25 United States Magistrate Judge
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